

TORTURE VICTIM PROTECTION ACT OF 1989

MAY 16, 1989.—Ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 1662 which on April 4, 1989, was referred jointly to the
Committee on Foreign Affairs and the Committee on the Judiciary]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1662) to amend the United Nations Participation Act of 1945 to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by providing a civil action for recovery from persons engaging in torture, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 3, line 15, strike "1988" and insert "1989".

Amend the title so as to read:

A bill to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by providing a civil action for recovery from persons engaging in torture, and for other purposes.

PURPOSE OF LEGISLATION

The purpose of the legislation is to provide a Federal cause of action against any individual who, under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing.

HISTORY OF LEGISLATION

I. *100th Congress*.—Legislation virtually identical to H.R. 1662 was introduced by Mr. Yatron and cosponsored originally by Judiciary Committee Chairman Rodino and Mr. Leach on March 4, 1987. The bill, H.R. 1417, was jointly referred to the Foreign Affairs Committee and the Judiciary Committee. The Foreign Affairs Subcommittee on Human Rights held a hearing on March 23, 1988, and the Foreign Affairs Committee marked up and reported the bill favorably to the House with an amendment on April 20, 1988. The Judiciary Committee adopted an amendment in the nature of a substitute and reported the bill, as amended, favorably to the House by voice vote on September 30. This amended bill passed the House by voice vote on October 5, 1988.

II. *101st Congress*.—H.R. 1662 was introduced by Mr. Yatron on April 4, 1989, and jointly referred to the Committee on the Judiciary and the Committee on Foreign Affairs. Original cosponsors included Judiciary Committee Chairman Brooks, Foreign Affairs Committee Chairman Fascell, Immigration Subcommittee Chairman Morrison, as well as Messrs. Leach, Bereuter, Broomfield, and Mazzoli. The bill was marked up by the Subcommittee on Immigration, Refugees, and International Law on April 5, 1989, and ordered favorably reported, with an amendment, to the full Judiciary Committee by voice vote.

NEED FOR LEGISLATION

A. THE PROBLEMS OF TORTURE AND EXTRAJUDICIAL EXECUTION

Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law. As the Second Circuit Court of Appeals held in 1980, "official torture is now prohibited by the law of nations." *Filartiga v. Pena-Irala*, 630 F. 2d 876, 884 (2d Cir. 1980). The prohibition against summary executions has acquired a similar status.

These universal principles provide scant comfort, however, to the many thousands of victims of torture and summary executions around the world. Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in the past decade alone. (See "Amnesty International, Political Killings by Governments 5" (1983).) Too often, international standards forbidding torture and summary executions are honored in the breach.

For this reason, recent international initiatives seeking to address these human rights violations have placed special emphasis on enforcement measures. A notable example is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted, with strong support from the U.S. Government, by the U.N. General Assembly on December 10, 1984. Essentially enforcement-oriented, this Convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts.

One such obligation is to provide means of civil redress to victims of torture.

Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact. The Torture Victim Protection Act [TVPA], H.R. 1662, would respond to this situation.

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." (28 U.S.C. sec. 1350). Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

In the case of *Filartiga v. Pena-Irala*, the Second Circuit Court of Appeals recognized a right of action against foreign torturers under the rarely invoked Alien Tort Claims Act. Citizens of Paraguay brought suit in Federal court against a former inspector general of police, who had tortured to death a family member of the plaintiffs, and who was present in the United States. The district court dismissed the complaint for lack of jurisdiction, construing the phrase "law of nations" narrowly; the Court of Appeals reversed. The appellate court unanimously acknowledged that although torture of one's own citizens was not recognized as a violation of the law of nations in 1789, when the Alien Tort Claims Act was enacted, the universal prohibition of torture had ripened into a rule of customary international law, thereby bringing torture squarely within the language of the statute. (See *Filartiga*, 630 F. 2d at 884-85).

The *Filartiga* case met with general approval. At least one Federal judge, however, questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action. In *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984), cert. denied 470 U.S. 103 (1985), a case involving terrorist activities of the Palestine Liberation Organization, Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit—and preferably contemporary—grant by Congress of a private right of action before U.S. courts could consider cases likely to have a substantial impact on U.S. foreign relations.

The TVPA would provide such a grant, and would also enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that

may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

COMMITTEE AMENDMENTS

In considering H.R. 1662, the committee adopted two extremely minor amendments. The first amendment, which altered the bill's heading, struck out language that indicated that the measure was drafted as an amendment to the United Nations Participation Act of 1945. In point of fact, the bill was not drafted as an amendment to that act, nor is there any compelling reason why it should be. The second amendment revised an incorrect reference to the Torture Victim Protection Act of 1988. That date was changed to 1989.

ANALYSIS OF LEGISLATION, AS AMENDED

The legislation authorizes the Federal courts to hear cases brought by or on behalf of a victim of any individual who, under color of law of any foreign nation, subjects any person to torture or extrajudicial killing. It defines "torture" and "extrajudicial killing" in accordance with international standards. The bill would apply only to those acts undertaken under color of official authority. Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts, the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred.

The definition of "torture" in the legislation is limited to acts by which severe pain or suffering, whether physical or mental, is intentionally inflicted for such purposes as obtaining a confession, punishment, or coercion. This language essentially tracks the definition of "torture" adopted in the Torture Convention. Like the definition included in the Torture Convention, this one also specifically excludes "pain and suffering arising only from or inherent in, or incidental to, lawful sanctions." Thus, the act would not permit suits based on the pain inherent in lawfully imposed punishments.

The term "extrajudicial killing" is defined in the bill as "a deliberated killing without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The definition thus excludes executions carried out under proper judicial authority. The inclusion of the word "deliberated" is sufficient also to exclude killings that lack the requisite extrajudicial intent, such as those caused by a police officer's authorized use of deadly force. The concept of "extrajudicial killing" is derived from article 3 common to the four Geneva Conventions of 1949.

The phrase "under color of law" makes clear that the plaintiff must establish governmental involvement in the torture or killing to prove a claim. Consistent with the present status of international law, the bill deals only with officially condoned, tolerated or encouraged acts of torture or extrajudicial killings. It does not attempt to deal with torture or killing by private groups.

The bill provides that a court shall decline to hear and determine a claim if the defendant establishes by clear and convincing

evidence that the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred. This requirement ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.

The TVPA is subject to restrictions embodied in the common law doctrine of sovereign immunity, now codified in the Foreign Sovereign Immunities Act of 1976 [FSIA]. Pursuant to the FSIA, "a foreign state," or an "agency or instrumentality" thereof, "shall be immune from the jurisdiction of the courts of the United States and of the States," with certain exceptions as elsewhere provided in the FSIA, and subject to international agreements to which the United States was a party at the time of the FSIA's enactment.

While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.

ADMINISTRATION POSITION

The administration has not indicated its position with regard to the instant legislation.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the committee estimates that this bill will not have an inflationary effect on prices and costs in the operation of the national economy.

ESTIMATE OF COST

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, the committee concurs with the cost estimates set forth below by the Congressional Budget Office.

BUDGETARY INFORMATION

Clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives is inapplicable because the instant legislation does not provide new budget authority. Pursuant to clause 2(1)(3)(C) of rule XI, the following estimate was prepared by the Congressional Budget Office and submitted to the committee:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 27, 1989.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1662, Torture Victim Protection Act of 1989, as ordered reported by the House Judiciary Committee on April 25,

1989. The bill makes any person who, under the authority of any foreign nation, tortures any person liable to the injured party in a civil action. The bill also provides Federal district courts with jurisdiction over any such civil action.

Enactment of this legislation is estimated to have no significant budget impact on Federal, State, or local governments.

Should the committee so desire, we would be pleased to provide further details. Your staff may contact Kent Christensen at 226-2840 for answers to any questions you may have.

Sincerely,

ROBERT D. REISCHAUER,
Director.

OVERSIGHT STATEMENT

Pursuant to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the committee states that it intends to monitor closely the operation of this legislation. In particular, the committee will maintain close liaison with the American Bar Association, which has supported the enactment of the instant legislation and which will likely, through its membership, be involved in any litigation contemplated by the bill.

Clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives is inapplicable since no oversight findings and recommendations have been received from the Committee on Government Operations.

COMMITTEE VOTE

H.R. 1662 was considered by the full Judiciary Committee on April 25, 1989, and was ordered favorably reported, with amendments, by voice vote.

COMMITTEE RECOMMENDATION

After careful consideration of this legislation, the committee is of the opinion that this bill should be enacted and accordingly recommends that H.R. 1662, as amended, do pass.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS: JURISDICTION

Sec.

1330. Action against foreign states.

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1367. Cases under law creating remedies against torture and extrajudicial killings.

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§ 1367. Cases under law creating remedies against torture and extrajudicial killings

The district courts shall have jurisdiction over civil actions under section 2 of the Torture Victim Protection Act of 1989.

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